FILE COPY

FILED
MAR 7 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 703.

THE BALTIMORE & OHIO RAILROAD COMPANY, Petitioner,

v.

RAY BERRY, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. ALLEN,
MARK D. EAGLETON,
HARRY M. STONE,
JOHN S. MARSALEK,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

	Page
Statement	1
Summary of argument	9
Petitioner's negligence was question for jury	9
Respondent did not assume the risk	11
Respondent was not negligent as a matter of law	12
Argument	14
Petitioner's negligence was question for jury	14
Respondent did not assume the risk	26
The injury was not due to negligence, sole or contributory, on respondent's part	30

Cases Cited.

Atlantic Coast Line R. Co. v. Banks, 288 Fed. 826	9
Bane v. Irwin, 172 Mo. 306	9, 11, 16
Buesching v. Gas Light Co., 73 Mo. 219	13
Burkhard v. Rope Co., 217 Mo. 466, l. c. 481	12
Carter v. Baldwin, 107 Mo. App. 217, l. c. 229	12
Cheasapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016	11, 27
Chicago G. W. R. Co. v. Healy, 86 Fed. 245, l. c. 248, and cases cited	13
Clark v. Iron & Fdy. Co., 234 Mo. 436, l. c. 448 et seq.	10, 16
Conroy v. Iron Works, 62 Mo. 35	12
Corby v. Telephone Co., 231 Mo. 417, l. c. 442	12
C. R. I. & P. R. Co. v. Ward, 252 U. S. 18, 63 L. Ed. 430	11
Davis v. Dowling, 284 Fed. 670	12
Doyle v. St. Louis M. B. T. Ry. Co. (Mo. Sup.), 31 S. W. 1010	11
Foster v. Mo. Pac. Ry. Co., 115 Mo. 165, l. c. 179	9, 22
Gila Valley R. Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521	11
Gratiot v. R. R., 116 Mo., l. c. 466	13
Herdler v. Range Co., 136 Mo. 3, l. c. 17	10, 18

Highfill v. City of Independence (Mo. Sup.), 189 S. W. 801 ..... 11, 20
Huskey v. Safety Boiler Co., 192 Mo. App. 370 ..... 9, 19
Kamer v. M. K. & T. R. Co. (Mo. Sup.), 32 S. W. (2) 1075, l. c. 1079-1080 12
Keegan v. Kavanaugh et al., 62 Mo. 230 10
Kielty v. Const. Co., 121 Mo. App. 58, l. c. 64 12
45 U. S. C. 53 ..... 12, 30
Labatt, Master & Servant, Vol. III, Sec. 906, p. 2403 .. 10, 19
McCauley v. Anheuser-Busch B. Assn., 300 Mo. 638 .. 9
Medley v. Mining Co., 207 S. W. 887 11
Mitchell v. C. & A. Ry. Co., 108 Mo. App. 142 9
Mooney v. Gasoline & Oil Co., 317 Mo. 1255, l. c. 1276 .. 12
Morgan v. Mo. Pac. Ry. Co., 136 Mo. App. 337 9
Myers v. R. R., 166 N. C. 233 9
Picket v. Quincy etc. R. Co., 156 Mo. App. 272 9
Schantz v. Northern Pac. R. Co., 42 N. D. 377, 173 N. W. 556 ..... 9, 10, 16, 23
Scherer v. Bryant, 273 Mo., l. c. 602 13
Schulties v. United Rys. Co. (Mo. Sup.), 236 S. W. 54 .. 9, 22
State ex rel. v. Ellison (Mo. Sup.), 223 S. W. 671 .... 10, 18
Steffens v. Fischer, 161 Mo. App. 386, l. c. 393 13
Stuart v. Standard Oil Co., 211 Mo. App. 345 9
Sullivan v. Hannibal & St. J. R. R., 107 Mo. 66, l. c. 78 ..... 10, 15
Sullivan v. Hines (Mo. App.), 218 S. W. 406 9
Topore v. Boston & M. R. R., 78 N. H. 311, 100 Atl. 153 ..... 9, 24
Troll v. Drayage Co., 254 Mo. 332, l. c. 337 13
Union Pacific R. R. Co. v. Hadley, Admr., 246 U. S. 330 12
Vandalia R. Co. v. Kendall, 68 Ind. App. 1, 119 N. E. 816 ..... 9, 11, 17, 23
Westover v. Wabash Ry. Co., 6 S. W. (2) 843 ..... 11, 26
Williams v. Terminal R. R. Assn. (Mo. App.), 20 S. W. (2d) 584, l. c. 586 9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 703.

THE BALTIMORE & OHIO RAILROAD COMPANY, Petitioner,

v.

RAY BERRY, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Respondent filed this suit in the Circuit Court, City of St. Louis, Missouri, to recover damages on account of injuries suffered by him while in the petitioner's employ. In the trial court he recovered judgment in the sum of $35,000. The petitioner, by due steps, appealed the case to the Supreme Court of Missouri, where the judgment was affirmed on condition that respondent remit $15,000 from the judgment. Respondent duly made such remittitur, in accordance with the Court's order.

The evidence at the trial showed without controversy that at the time of the accident petitioner and respondent were engaged in interstate commerce. Respondent's petition, filed in the trial court, alleges, and the evidence shows, that on February 10, 1926, he was performing the duties of rear brakeman, or flagman, on one of defendant's freight trains running from East St. Louis, Illinois, to Washington, Indiana. The train left East St. Louis on the night of February 9th, and about 4:30 the next morning, while it was still dark, was brought to a stop at Xenia, Illinois, with the caboose of the train extending over a trestle. The trestle had no walkway beside the track, and no railing or other protective device to prevent persons from falling therefrom. The caboose was practically the same width as the trestle. Respondent, at the order of the conductor of the train, alighted from the caboose, not knowing that it was on the trestle, and fell a distance of about twenty feet, suffering severe and permanent injuries.

Respondent's petition sets out a number of allegations of negligence on the part of petitioner's servants, other than respondent, as the cause of the injury, but we will notice only the two following, which were submitted to the jury:

> "1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, al-

though they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, and they thereby negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid.

"2. They negligently caused and permitted said caboose to stop on said trestle as aforesaid, although they knew, or by the exercise of ordinary care would have known, that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe" (Abs., p. 3).

The petitioner's answer was a general denial, and a plea that respondent assumed all the ordinary risks incident to his employment, and all extraordinary risks which he knew and appreciated, or which would have been apparent to him; further, that his injury was due to his own negligence directly contributing thereto, in failing to look where he was stepping when he stepped off the caboose, although he knew there was a trestle in the vicinity of the place where the train and caboose were stopped.

The reply of respondent was a general denial.

Respondent testified that he had been in the employ of the petitioner for about nine years at the time of his accident. Just previous to his accident he was riding in the caboose of the train (Rec., p. 11), which consisted of forty-two cars, each about forty-two feet long. The en-

gine, with its tender, was probably sixty or seventy-five feet in length, and the caboose about forty feet (Rec., p. 32).

Three or four miles west of Xenia, Illinois, respondent and Mr. Dant, the conductor, discovered a hot box on one of the cars, eight or nine cars ahead of the caboose. They were in the caboose at the time. The oil and waste in the box was on fire and was blazing. The conductor decided to stop the train. The respondent signaled the engineer. The train stopped at a point about three miles west of Xenia, and the respondent and the conductor go off. The conductor sent respondent to the engine to get a bucket of water to put out the fire, and told respondent to tell the engineer that at the next stop, at Xenia, they would finish fixing the hot box (Rec., p. 13). Respondent conveyed this order to the engineer and returned with the bucket of water, and he and the conductor used it to extinguish the flames. The train then proceeded eastwardly again, and stopped after moving a distance which respondent estimated to be three miles. When the train stopped the conductor ordered respondent **to get out and go ahead and fix the hot box; to finish fixing it.** Respondent was unaware of the fact that the caboose was upon the trestle when the conductor ordered him off. He stated:

> "After receiving this last message or order from the conductor, I took my lantern and started to get

off the caboose, I suppose, to fix it, to go on back up there and finish fixing the hot box, and I walked down the caboose steps, and I thought I was stepping on the ground, and I stepped off into space. I was carrying the lantern in my left hand. It was a small railroad lantern; signal lantern, in other words" (Rec., p. 13).

Respondent testified that his lantern threw out a circle of light, around about the center of the lantern, but the light did not extend up and down. Respondent further testified:

"Q. **Had this train, or any other train, to your knowledge, at any other time in your entire experience, ever stopped with the caboose or any part of it on top of this trestle?**

A. **No, sir**" (Rec., p. 15).

When the train stopped the locomotive was at the switch leading into the passing track at Xenia. Respondent did not know whether the caboose of a forty-two-car train, stopped with the locomotive at the passing track switch, would clear the trestle or not. He had no experience in that connection (Rec., p. 33).

Albert H. Woerner, a witness for petitioner, described the trestle in question, and stated that there were between forty-five and fifty such trestles between East St. Louis, Illinois, and Washington, Indiana. Five or six of them

had sidewalks or railings on the side. Sidewalks and railings were installed where they were absolutely needed for the safety of the trainmen. They were installed for the safety of the switchman who was required to get off the front end of the train to open the switch. They were not placed on trestles more than 250 or 300 feet from a switch. The trestle in question was 1,950 feet from the switch.

Harry S. Smith, petitioner's trainmaster, described the duties of the rear brakeman or flagman as follows:

> "It is the duty of the rear brakeman or flagman to ride the rear car of the train, and it is their duty **to protect the train at all times when it is standing on the main track**, and at other times it is his duty **to assist the members of the crew in performing the duties assigned to them, closing switches, opening switches, setting off cars, picking up cars, fixing hot boxes and so forth.** If a train is out on the main line and is to pass from the main line onto the passing track, as this train in question was doing at the time or intending to do, the head brakeman opens the switch and the flagman or rear brakeman closes it. The head brakeman, of course, opens that switch before the train passes in. He rides on the engine. Then, as the train came along, the head brakeman would either get onto the engine and go to the opposite end of the train, or he would stand there and let the train pull by, and then walk down to the opposite end, unless they had some street crossing that is open. The flagman would close the switch after the rear end of the train passed the clearance point" (Rec., pp. 37-38).

A. J. Dant, petitioner's conductor, testified that he was in charge of the train and of the whole crew on the occasion of respondent's injury (Rec., p. 42). He testified that he and the respondent discovered the hot box on the train about four miles west of Xenia; that the train was not stopped after the discovery of the hot box until the stop was made to go into the passing track; that when the train stopped witness did not say anything to respondent; that respondent got down out of the cupola. Witness was looking out of the window to see what kind of stop they were going to make for the switch. After that he heard respondent "holler."

Witness testified that the engineer of the train, Charlie Schrum, was in court. There was a headlight on the locomotive, with the aid of which the engineer could see how close he was to the switch point. Witness was not able to determine positively, when the train stopped, how far the locomotive was back from the switch point, but he judged anywhere from a car length and a half to three cars. In the opinion of the witness the trestle was equal in length to a car. If the train had moved another car length further east the caboose would have cleared the trestle and there would have been a footing there for a man to get off the caboose.

Witness further stated that a hot box was one of the things they attempted to get fixed in order to prevent any further flaring up or any damage by fire, or anything of that kind, and also to prevent accidents, in the sense

that if something burns off or burns up a car may turn over, and things of that kind may occur; that it was the imperative duty of the flagman, or any other member of the crew, to attend to a hot box. Witness intended to have this hot box fixed after the train got into Xenia, after they got in onto this passing track (Rec., pp. 42-3). Witness did not know that the caboose had stopped on the trestle when it came to a stop.

SUMMARY OF ARGUMENT.

(1)

The question of petitioner's negligence was one for the jury. It was for the jury to say whether petitioner's conductor was negligent in ordering the respondent to alight from the train without first making any inquiry to determine whether the respondent could safely comply with the order.

Foster v. Mo. Pac. Ry. Co., 115 Mo. 165, l. c. 179;
Schulties v. United Rys. Co. (Mo. Sup.), 236 S. W. 54;
McCauley v. Anheuser-Busch B. Assn., 300 Mo. 638;
Bane v. Irwin, 172 Mo. 306;
Morgan v. Mo. Pac. Ry. Co., 136 Mo. App. 337;
Picket v. Quincy etc. R. Co., 156 Mo. App. 272;
Williams v. Terminal R. R. Assn. (Mo. App.), 20 S. W. (2d) 584, l. c. 586;
Mitchell v. C. & A. Ry. Co., 108 Mo. App. 142;
Sullivan v. Hines (Mo. App.), 218 S. W. 406;
Stuart v. Standard Oil Co., 211 Mo. App. 345;
Huskey v. Safety Boiler Co., 192 Mo. App. 370;
Atlantic Coast Line R. Co. v. Banks, 288 Fed. 826;
Schantz v. Northern Pac. R. Co., 42 N. D. 377, 173 N. W. 556;
Vandalia R. Co. v. Kendall, 68 Ind. App. 1, 119 N. E. 816;
Topore v. Boston & M. R. R., 78 N. H. 311, 100 Atl. 153;
Myers v. R. R., 166 N. C. 233;

Labatt, Master & Servant, Vol. III, Sec. 906, p. 2403.

(2)

Mr. Dant, the conductor of the train, was in charge of the crew. It was respondent's duty to obey his order "to get out and go ahead and fix the hot box" (Rec., p. 13). **The order was tantamount to an assurance that respondent could comply therewith in safety, and upon this assurance the respondent was entitled to rely.**

Keegan v. Kavanaugh et al., 62 Mo. 230;
Sullivan v. Hannibal & St. J. R. R., 107 Mo. 66, l. c. 78;
Herdler v. Range Co., 136 Mo. 3, l. c. 17;
Schantz v. Northern Pac. R. Co., 173 N. W. 556, 42 N. D. 377.

(3)

The duty rests upon the master, through his vice-principal, before issuing a command to the servant, to make proper inquiry to determine whether the order may, with reasonable safety, be executed by the servant.

Herdler v. Range Co., 136 Mo. 3, l. c. 17;
State ex rel. v. Ellison (Mo. Sup.), 223 S. W. 671;
Clark v. Iron & Fdy. Co., 234 Mo. 436, l. c. 448 et seq.

(4)

The fact that work is necessarily attended with some danger does not relieve the master from the duty to exer-

cise reasonable care, but emphasizes the importance and necessity of those having charge of the work proceeding carefully and cautiously, and under such circumstances, especially, is the master culpable if he causes the servant's injury by ordering him into a position of peril which the master could have discovered before giving the order.

Highfill v. City of Independence (Mo. Sup.), 189 S. W. 801;
Medley v. Mining Co., 207 S. W. 887.

(5)

Respondent did not assume the risk arising from the negligence of the conductor in ordering him to alight from the caboose at the trestle, because the dangerous position of the caboose was not known to respondent, nor was the danger so obvious that the Court could say, as a matter of law, that respondent must have known of it.

Westover v. Wabash Ry. Co., 6 S. W. (2) 843;
Doyle v. St. Louis M. B. T. Ry. Co. (Mo. Sup.), 31 S. W. 1010;
Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1;
Bane v. Irwin, 172 Mo. 306;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016;
C. R. I. & P. R. Co. v. Ward, 252 U. S. 18, 63 L. Ed. 430;
Gila Valley R. Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521.

(6)

The Court could not say, as a matter of law, that respondent was guilty of negligence in complying with the conductor's order.

Burkhard v. Rope Co., 217 Mo. 466, l. c. 481;
Mooney v. Gasoline & Oil Co., 317 Mo. 1255, l. c. 1276;
Corby v. Telephone Co., 231 Mo. 417, l. c. 442;
Conroy v. Iron Works, 62 Mo. 35;
Kielty v. Const. Co., 121 Mo. App. 58, l. c. 64;
Carter v. Baldwin, 107 Mo. App. 217, l. c. 229.

(7)

Nor could the Court say, as a matter of law, that negligence on respondent's part, if there was such, caused the injury, solely and independently of the negligence of the conductor in ordering him to get off the car at a dangerous place.

45 U. S. C. 53;
Davis v. Dowling, 284 Fed. 670;
Union Pacific R. R. Co. v. Hadley, Admr., 246 U. S. 330;
Kamer v. M. K. & T. R. Co. (Mo. Sup.), 32 S. W. (2) 1075, l. c. 1079-1080.

(8)

In passing upon a demurrer to the evidence, it is the duty of the Court to accept as true all evidence in favor

of plaintiff and all inferences in plaintiff's favor which may, within any degree of propriety, be drawn therefrom, and the Court cannot draw inferences in favor of defendant to counterbalance or overthrow inferences in plaintiff's favor.

The Court can direct a verdict for defendant only when the evidence and the inferences to be drawn therefrom, considered in the light of the foregoing rule, show conclusively that plaintiff has no case.

Troll v. Drayage Co., 254 Mo. 332, l. c. 337;
Buesching v. Gas Light Co., 73 Mo. 219;
Gratiot v. R. R., 116 Mo., l. c. 466;
Scherer v. Bryant, 273 Mo., l. c. 602;
Steffens v. Fischer, 161 Mo. App. 386, l. c. 393;
Chicago G. W. R. Co. v. Healy, 86 Fed. 245, l. c. 248, and cases cited.

ARGUMENT.

The Question of Petitioner's Negligence Was One for the Jury.

The general rule governing the action of the trial court, in passing upon a demurrer to the evidence at the close of all the testimony, is well established. It is the duty of the Court to view the evidence in its light most favorable to plaintiff, conceding the truth of all evidence in the record tending to support plaintiff's case, and giving the plaintiff the benefit of every inference which can, within any degree of propriety, be drawn in his favor. All evidence in defendant's favor must be rejected, and the Court cannot draw inferences in defendant's favor to countervail or overthrow inferences supporting plaintiff's case. The rule applies with reference to all issues of fact in this case, including the issues of petitioner's negligence, respondent's contributory negligence and his alleged assumption of the risk. These rules are followed by the Federal Courts as well as by the Courts of Missouri, as the authorities which we have cited in our brief will show.

The conductor was guilty of negligence in ordering respondent to alight at a dangerous place.

We contend there was sufficient evidence to take the case to the jury on the issue of the negligence of petitioner, through its conductor, in ordering respondent, in

the nighttime, to alight from the caboose and go ahead and fix the hot box, when the caboose was stopped over a trestle.

It cannot be denied that petitioner's conductor, by the exercise of ordinary care, could have discovered that the caboose, at the time he ordered respondent to alight, was standing over the trestle. That respondent's safety, in complying with his order, would be and was imperiled is a self-evident fact.

The conductor of the train was in charge of the entire crew. He was respondent's superior, and it was respondent's duty to obey his orders. Such orders carry with them an assurance of safety, **upon which the servant is entitled to rely.** The rule is recognized in **Sullivan v. Railroad, 107 Mo. 63, l. c. 78,** where the Court said:

> "And having given the plaintiff the original assurance that the staging was safe, the fact that Prather was present and ordered and superintended the removal of the last section of the roof when the accident occurred was tantamount to a tacit assertion that it was safe for plaintiff to proceed with the removal of that section, and plaintiff was not bound to search for danger, but had a right to rely upon the judgment and discretion of the defendant's foreman that he would fully perform the measure of his duty towards him."

Similar statements of law have been repeated time and time again in master-and-servant cases.

In **Clark v. Iron & Foundry Co., 234 Mo. 436, l. c. 450,** the Court stated the rule was academic. We quote from the opinion:

> "It is equally academic that this duty of the master was imposed upon its vice-principal, Armstrong, the foreman in charge of the work, and whose orders appellant was obeying in ascending the pole and adjusting the guy ropes. And the foreman's order to the appellant to ascend the pole and do the work designated was an assurance that the place was reasonably safe for that purpose (Sullivan v. Railroad, 107 Mo., l. c. 78)."

And in **Bane v. Irwin, 172 Mo., l. c. 316,** the Court said:

> "The plaintiff did not assume the risk to which he was exposed by the negligent order of his foreman. The plaintiff's evidence tended to prove that the foreman had lighted the third shot but had told the plaintiff he had not done so; that plaintiff left the foreman in the immediate vicinity of the third shot, and that plaintiff had every reason to rely upon what Gibbs, the foreman, told him, and that the foreman, without waiting for the shot to explode, ordered plaintiff back into the dangerous place. As said by Judge Sherwood in Sullivan v. Railroad, 107 Mo., l. c. 78, * * * and plaintiff had a right to rely on the judgment of the foreman that he would perform his duty to him * * *."

The rule is not peculiar to Missouri. It is generally recognized. In **Schantz v. Northern Pacific Ry. Co., 42**

N. D. 377, 173 N. W. 556, suit was brought to recover damages for the death of a section man injured when attempting to board a moving freight train to return from his work, on the order of his foreman. The Court held that the negligence of the foreman, in directing or ordering deceased to board the moving train, was for the jury. In discussing this phase of the case the Court said:

> "It is one of the absolute duties of the master to exercise due care for the safety of his servants. Where it is necessary in the course of the conduct of the business of the master that orders be given to the servants concerning their conduct or the place where they are to work, or to go in pursuit of the master's business, the master has not only a right, but also the absolute power, to give such orders, and the servants have the right to assume that the master has exercised due care in so giving the same."

In **Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1,** which involved facts similar to the Schantz case, the Court said:

> "The servant does not stand on the same footing with the master. His primary duty is obedience; and, if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. It is upon this inequality of position that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the master has placed him, and is not bound at his peril to set his own judgment above that of his superior."

In the course of the discussion the Court makes the following significant remark:

> **"By giving a direct command to perform the work, the master takes upon himself the risk which otherwise would be assumed by the servant."**

It is equally well settled that the duty rests upon the master, through his vice-principal, before issuing a command to the servant, to make proper inquiry to determine whether the order may, with reasonable safety, be executed by the servant.

In the oft-cited case of **Herdler v. Buck's Stove & Range Co., 136 Mo. 3,** where plaintiff was injured by the collapse of a beam against which, at his foreman's order, he rested a ladder, the Court said (l. c. 17):

> "Defendant was bound to inspect and see that these posts were properly secured before ordering carpenters to go upon them."

In **State ex rel. City of St. Joseph v. Ellison et al., 223 S. W. 671,** the Court passed upon an opinion of the Kansas City Court of Appeals, affirming a judgment for plaintiff. The plaintiff went upon a pole at the order of his foreman, and the pole broke. The Court approved the opinion of the Court of Appeals, in which it was stated:

> "Under the foregoing circumstances, if the foreman failed to exercise ordinary care in ascertaining

whether the pole was or was not reasonably safe to be climbed, and ordered plaintiff to go up the pole and remove the wires, then there can be no doubt of defendant's liability. Clearly, whether plaintiff was or was not so ordered, was a question for the jury and not for us to decide. It was at most merely a question of veracity between plaintiff and the foreman."

That the master is liable for an injury resulting from a failure to use reasonable care with respect to orders and instructions given the servant in the course of the work is a proposition which is thoroughly established. The rule is stated in **Labatt on Master and Servant (2nd Ed.), Volume III, Section 906, page 2403,** as follows:

"The degree of care required of an employer in protecting his employes from injury is the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work.

"It may be stated that it is the duty that the law requires of the master to use all reasonable means and precautions against injuring a servant which ordinary prudence and foresight, in the light of the existing knowledge of conditions, dictates. This has reference, not only to a safe place in which to work and the kind of appliances furnished, **but as well to the requirements, demands and orders issued to servants from time to time in the process of the work."** (Emphasis ours.)

This rule was quoted and applied in **Huskey v. Boiler**

Company, 192 Mo. App. 370, l. c. 374, and we submit is a fair statement of the law of this state on the subject.

While the degree of care enjoined upon the master by this rule is ordinary care, the standard is one which adjusts itself to the circumstances. Where the situation is one in which danger lurks, the law requires of the master a higher degree of vigilance and foresight, with respect to orders issued to the servant, than in occupations where the danger of injury is slight. The law on this subject is forcefully stated in the case of **Highfill v. City of Independence, 189 S. W. 801.** In that case the servant was assisting in demolishing a building, an occupation attended by extreme danger, and to which the safe-place rule cannot be applied in its ordinary sense. The Court held the master liable for an order negligently given the servant, which resulted in the servant's injury, stating:

> "It is true, as contended by appellant, that the work in which the plaintiff was engaged was one of demolition of structure, and that, in such case, if the employe is injured as the result of a transitory danger which is necessarily incident to such employment, the employer is not liable; but in this case it appears that the plaintiff was not engaged in the performance of a mere isolated act without instructions as to his conduct, but was acting in pursuance of directions and upon appearances reasonably safe.
>
> "The rule in demolition cases does not relieve the employer of the duty to exercise ordinary care and caution for the safety of its employes; due consider-

ation being given to the peculiar circumstances and dangerous nature of the work and the impracticability of rendering it entirely safe.

"In demolishing structures the employer cannot heedlessly, and without caution on its part, proceed in the work. The very fact that such undertakings are accompanied by grave dangers only emphasizes the importance and necessity of those in charge of such work proceeding carefully and cautiously. When they give instructions to those who are to perform the work, and when the situation is such that the danger incident thereto is not reasonably apparent, **the servant is warranted in assuming that before such instructions were given the principal had made such investigation as the circumstances required**, and that the same, absent notice to the contrary, reasonably warranted the conclusion that the work, if done in an ordinary way and with the facilities provided for that purpose, could be done with safety.

"If those in control of a situation induce others to unknowingly assume a position of peril and injury results, and the peril was known or should have been known to the inducing party, law and humanity join in demanding for the injured one a just recompense." (Emphasis ours.)

When the servant is injured as a result of his compliance with an order of his superior the negligence of the superior, in issuing the order which results in such injury, is ordinarily a question for the jury. Such conclusion was

reached in the following cases involving facts analogous to the present case:

Foster v. Mo. Pac. Ry. Co., 115 Mo. 165: The plaintiff was ordered by defendant's roadmaster to board a construction train which was in motion, and while so doing was struck by a tie thrown from the car by the men upon it. This Court held that the question of the roadmaster's negligence, in ordering plaintiff to board the car, was one for the jury. In the course of the opinion it is said (l. c. 179):

> "As persons are legally chargeable with the natural and probable consequences of their acts, we consider that it was obviously proper, upon the evidence above outlined, to submit to the triers of fact the issue whether the foreman's order, as and when given, was or was not characterized by a want of ordinary and reasonable care for the safety of the plaintiff, and whether or not, if negligent, the order was the immediate cause of his injury."

In **Schulties v. United Rys. Co., 236 S. W. 54,** the Court held that plaintiff was entitled to recover for an injury received under the following circumstances: The plaintiff was employed in defendant's car shed as an assistant to its brake repair man, under whose orders he worked. Plaintiff and his superior boarded one of the cars for the purpose of moving it to another place. The repair man told plaintiff to put the trolley on, which plaintiff did.

After the car was started, and just as plaintiff was ready to go inside the car, and was standing on the step, the repair man called to him, "Grab the rope," referring to the trolley rope. Plaintiff turned around and grabbed for the rope, and was struck by a pole located close to the track. The Court held that the defendant was not guilty of negligence with reference to the location of the pole. It was further held that the repair man had implied authority to tell plaintiff to grab the trolley rope as he did, and that it was plaintiff's duty, under the circumstances, to obey the order, although there might not in fact have been any necessity for so doing. That if the order to grab the rope was given when the car was moving toward the post, and was within two or three feet of it, as plaintiff's evidence tended to show, then it was for the jury to say whether the order was negligently given, and whether it was the proximate cause of plaintiff's injury.

We have above called attention to the cases of:

Schantz v. Northern Pacific Ry. Co., 173 N. W. 556, 42 N. D. 377;
Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1.

In each of the above cases the negligence of the master in ordering plaintiff to board a moving car was held to be a question for the jury.

In **Topore v. Boston & M. R. R., 100 Atl. 153, 78 N. H. 311,** it was held that where deceased, shoveling coal in a locomotive tender, was ordered to jump off, and was struck by a train moving in the opposite direction, whether such result should not have been anticipated by the boss was for the jury and raised a jury question as to the negligence of the boss.

We have cited other cases involving the same general consideration involved in the present case, under point (1) of our brief. They illustrate the various circumstances under which the courts have declared that the question of negligence on the part of a foreman or other superior, in issuing a command to an inferior servant, is a matter for the jury.

In the cases above reviewed (and others cited in our brief), where injuries have befallen employes as a result of a foreman's order to board or alight from a moving car, the considerations involved in determining whether the foreman's order was in fact a negligent one are largely the same as those involved in the present case. Whether a train is moving too rapidly for the employe to board or alight in safety, or whether there are other dangers, such as approaching trains, obstructions beside the track (or a pitfall, as in this case), which may cause injury to the servant, are matters which the foreman should take into consideration before issuing the order. In the various cases we have cited, the opportunity of the foreman to

discover the existing danger before issuing the order was no greater than the opportunity of the conductor, in the present case, to discover that the caboose was on the trestle. It will be conceded that, if the conductor had exercised ordinary care to do so, he could have discovered, before telling respondent to alight, that the caboose was on the trestle.

Petitioner contends that respondent should have remained on the caboose until the train was pulled into the siding. This contention is of no avail against respondent, since he was acting pursuant to an order of his superior; it does greatly emphasize, however, the fact that the conductor was negligent in ordering respondent to alight at the time he did. If good railroading and ordinary prudence demanded that the repairs to the hot box be postponed until the train had pulled up on the siding, then the conductor was plainly guilty of negligence in giving respondent the premature order shown by the evidence.

It is contended that the respondent in this case had an equal opportunity, with the conductor, to discover the location of the caboose. The same observation would apply in most of the cases where the injury resulted from an order to board or alight from a moving train. Such course of reasoning erroneously denies any effect to the master's order and remits the servant to the same legal position he would occupy if no order had been given.

In the present case it was the conductor's positive duty not to order respondent to alight from the caboose at a

place where compliance with the order would subject respondent to danger of injury. The obligation to inquire if the order could be safely executed rested upon the conductor, not on the respondent. **Obviously, the respondent could not know, when the conductor ordered him to alight, whether the conductor had performed this duty or not.** The respondent had the clear legal right to rely upon the assurance of safety, implied by the conductor's order, and to assume that the conductor had made such observation as was necessary before issuing the order.

We respectfully submit that the negligence of the conductor, in giving respondent this order without first making proper inquiry as to the circumstances, was clearly an act of negligence for which the petitioner should be required to respond.

Respondent Did Not Assume the Risk.

It is claimed that the respondent assumed the risk, under the federal rule, notwithstanding the fact that he was acting pursuant to the order of his superior, and did not know that the caboose was standing on the trestle.

A somewhat similar situation was before the Court in **Westover v. Wabash Ry. Co., 6 S. W. (2) 843**, where the plaintiff, a switchman, while standing on the steps of an engine tender, was struck by a switch stand located about four feet from the track. The crew of which

plaintiff was a member frequently ran through the yard where the accident occurred, and the stand by which he was struck was plainly visible to him on such trips. It was calculated to attract attention, because there was but one other like it in this yard. The Court held that, although plaintiff assumed the ordinary risks and hazards incident to his employment, and also risks caused by his employer's negligence, if the facts were fully known to him, or so plainly observable that they would be presumed to be known to him, **he was not obliged to use even ordinary care to discover dangers resulting from his employer's negligence.** Whether the nearness of the switch stand to the track, and the danger inherent to the situation, would inevitably have disclosed themselves to a person in plaintiff's situation, was held to be a question for the jury.

Under the law of assumption of risk, as declared by the United States Supreme Court, the servant is absolved completely from any duty to look for, or anticipate danger from, the negligence of the master. He may confidently rely upon the exercise of ordinary care by the master, and, when the master fails in this duty, the assumption-of-risk doctrine comes into play only after the servant has actual knowledge of the facts or situation from which the danger arises, unless the condition from which the danger arises is obvious.

In **Chesapeake & Ohio R. Co. v. De Atley, 241 U. S. 314, 60 L. Ed. 1016,** the plaintiff, a brakeman, was injured

while attempting to board the engine of a train which was moving directly toward him at the speed of twelve miles per hour. The case was submitted to the jury under instructions making defendant's liability depend upon whether the engineer, with knowledge of plaintiff's purpose to board the train, negligently operated it at a rate of speed so as to make plaintiff's attempt to board it unusually hazardous. There was a verdict for plaintiff. The case went on writ of error to the United States Supreme Court, where the chief question involved was the alleged assumption of risk by plaintiff. The Supreme Court held that plaintiff assumed the risk normally incident to boarding a moving train, but not any risk which might arise from the failure of the engineer to operate the train with due care and at a moderate rate of speed; that plaintiff had the right to presume that the train would be operated at a moderate rate of speed "until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other." The Court, in its opinion, stated:

> "It is insisted that the true test is not whether the employe did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with

the rule repeatedly laid down and uniformly adhered to by this Court. **According to our decisions, the settled rule is not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.''**

In the foregoing case this Court held that an employe, in broad daylight, who, without any order from any superior, stood beside a track with the intention of boarding an approaching locomotive which was in plain view, and which he was watching, had the right to presume that the engineer would exercise ordinary care for his safety by operating the locomotive at a moderate rate of speed in order to enable him safely to board it, and that the employe was not chargeable, as a matter of law, with knowledge of the fact that the locomotive was being operated at a rate of speed which was unusually high and dangerous. We contend that the respondent in this case had the same right to rely upon the exercise of ordinary care by the petitioner's conductor in issuing the order which resulted in respondent's injury, and was not charge-

able, as a matter of law, with knowledge of the fact that the caboose was on the trestle.

It is not claimed in this case that respondent actually knew that the caboose was stopped upon the trestle when he was ordered to get off. He did not discover that fact before he fell. He was not required to anticipate that the conductor was sending him into danger by a premature and improvident order, and cannot be held, under the controlling authorities, to have assumed the risk arising from such negligence. He would have assumed the risk only if the evidence showed that he had actually discovered the position of the caboose before he fell, or if under all the circumstances the conclusion was inevitable that he must have known of it. No such conclusion can be drawn in this case, for it is obvious that if respondent had known that the caboose was upon the trestle, he would not have alighted from it.

The Injury Was Not Due to Negligence, Sole or Contributory, on Respondent's Part.

The question of negligence on respondent's part is also raised in petitioner's brief. Under the Federal Employers' Liability Act (45 U. S. C. 53), contributory negligence on respondent's part would not defeat his action, but would go merely to diminish his damages.

The contention is made that respondent's fall was due solely to negligence on his part. We deny that he was guilty of negligence, as a matter of law, and also deny

that his injury was caused solely by his own acts, whether they be considered negligent or not.

The negligence of a servant, who is injured in complying with an order of the master, is a question for the jury, unless, in complying with the order, the servant incurs a danger which is both **obvious** and **imminent**. In the present case the danger was not obvious, because of the darkness. In getting off the caboose, holding his lantern before him, moving from the light into the darkness, respondent's lantern necessarily created a curtain of light below him, which prevented him from discovering that he was not alighting on the surface. Under such circumstances the question of his negligence was one for the jury (Authorities, Point [6] supra).

Even if we conceded that respondent was negligent, as a matter of law (which we by no means do),—by what process could the Court say that his negligence was the sole cause of his injury, so as to defeat his action under the Federal Employers' Liability Act? The Court could not rightfully exclude from consideration the conductor's negligent order, which bore the clearest causal relation to the act of respondent in alighting at the time and place he did. If respondent was negligent in alighting from the caboose at a dangerous place, the conductor was equally negligent in ordering him to alight at a dangerous place.

It is quite obvious that the trial court could not have sustained the petitioner's demurrer on the theory that re-

spondent was guilty of negligence, as a matter of law, and that such negligence was the sole cause of his injury. We have cited the applicable authorities in our brief.

We respectfully submit that the petition should be denied.

WILLIAM H. ALLEN,
MARK D. EAGLETON,
HARRY M. STONE,
JOHN S. MARSALEK,
Counsel for Respondent.